



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 18, 1995

Honorable Bob Covington  
County Attorney  
Guadalupe County  
101 East Court Street, Suite 104  
Seguin, Texas 78155

OR95-633

Dear Mr. Covington:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request an identification number, ID# 28245.

You have received a request for the "investigative file pertaining to the allegation that [three named members of the Cibolo City Council] violated the Texas Open Meetings Act in connection with termination of former City Administrator David Walker by the Cibolo City Council." You have submitted for our review copies of information responsive to the request. See Gov't Code § 552.303 (requiring governmental body that requests attorney general decision on open records request to supply to attorney general specific information requested). You believe that you may withhold some of the information, which you have identified, pursuant to sections 552.101, 552.103, 552.108, and 552.111 of the Government Code.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You believe that the informer's privilege, which this office long has recognized as one aspect of section 552.101, see Open Records Decision No. 549 (1990) at 4-5, excepts some of the requested information from required public disclosure.

In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale underlying the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. The purpose of the

privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials, and, by preserving their anonymity, encourages them to perform that obligation. [Citations omitted.]

The informer's privilege authorizes a governmental body to withhold information that would reveal the identity of a person who reports possible violations of the law to officials charged with enforcement of that law. Open Records Decision No. 462 (1987) at 14. Significantly, however, the informer's privilege protects the content of communications only to the extent that it identifies the informants. *Roviaro*, 353 U.S. at 60. Additionally, once an individual who would have cause to resent the communication knows who the informer is, the informer's privilege is inapplicable. See Open Records Decision No. 202 (1978) at 2 (quoting *Roviaro*, 353 U.S. at 60).

You have demonstrated that the informants in this case reported to officials charged with enforcement of the law information regarding what the informants believed to be a violation of the law. Furthermore, we do not understand from our review of the records that the persons who would have cause to resent the allegations currently know the identity of the informants. We conclude, therefore, that you may, pursuant to section 552.101 of the Government Code, withhold from required public disclosure some of the requested information.<sup>1</sup> You may withhold only that information tending to identify the informants, that is, those individuals who reported a possible violation of the law.

You contend that section 552.103 excepts some of the requested information from required public disclosure. Section 552.103(a) of the Government Code excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

---

<sup>1</sup>The informer's privilege, unlike other components of Government Code section 552.101, is discretionary. Open Records Decision No. 549 (1990) at 6. Thus, the city may choose to release the requested information with impunity.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990).

You have informed us that the three city council members against whom the allegations were made have filed a civil action related to the allegations. Consequently, we must conclude that litigation is pending. Section 552.103 thus entitles you to withhold from disclosure to the public those documents for which you claimed section 552.103. Absent special circumstances, however, once all parties to the litigation have obtained the requested information, *e.g.*, through discovery or otherwise, your office has no section 552.103(a) interest to justify withholding that information. Open Records Decision Nos. 349 at 2, 320 at 1 (1982). Finally, our conclusion with regard to section 552.103 is good only until the litigation concludes. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision No. 350 (1982) at 3.

Section 552.108, which you also raise, excepts from required public disclosure the following:

- (a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . .
- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . .

After a file has been closed, either by prosecution or by administrative decision, the availability of section 552.108 is greatly restricted. Open Records Decision No. 320 (1982) at 1. To determine whether information regarding a closed investigation is excepted from public disclosure under section 552.108, we consider whether release of the records unduly would interfere with the enforcement of the law and the prevention of crime. Open Records Decision No. 553 (1990) at 4 (and cases cited therein). A governmental body claiming the "law enforcement" exception reasonably must explain how and why release of the requested information unduly would interfere with law enforcement and crime prevention. Open Records Decision No. 434 (1986) at 2-3. You have not demonstrated that release of any of the requested information would interfere with law enforcement and crime prevention. Consequently, we must conclude that section 552.108 does not authorize you to withhold the requested information.

Finally, you contend that section 552.111 of the Government Code authorizes you to withhold portions of the requested information from required public disclosure. Section 552.111 of the Government Code authorizes a governmental body to withhold from required public disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993) at 5, this office construed the statutory predecessor to section 552.111 as follows:

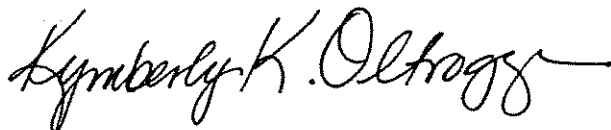
We conclude that section [552.111] excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. Section [552.111] does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. . . . [W]e stress that . . . to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. [Footnote deleted.]

Many of the documents you have submitted memorialize communications between your office and parties or representatives of parties who are likely to have opposed your office in litigation concerning the allegations made. Such information is outside the ambit of section 552.111. Additionally, some of the information consists of post-decisional, not pre-decisional, advice or opinions. We agree, however, that some portions of the requested information that is not otherwise excepted consists of interagency or intra-agency memoranda or letters reflecting advice, opinion, and recommendation regarding the policymaking processes of your office. Accordingly, we conclude that section 552.111 authorizes you to withhold portions of the requested information.

For your convenience, we have marked those portions of the requested information that you may withhold, either under section 552.101, section 552.103, or section 552.111.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, reading "Kymberly K. Oltrogge", with a long horizontal flourish extending to the right.

Kymberly K. Oltrogge  
Assistant Attorney General  
Open Government Section

Enclosures: Marked documents

cc: Mr. Patrick C. Bernal  
Denton, McKamie & Navarro  
310 South St. Mary's Street, Suite 1700  
San Antonio, Texas 78205-3108  
(w/o enclosures)